Kaolin (M) Sdn Bhd v Samba Sirvang a/l Thanimalai

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–59 OF 1998
KC VOHRAH J
7 NOVEMBER 2000

Labour Law *— Employment — Redundancy — Employee seconded to position subsequently made redundant — Previous position before secondment not redundant — Burden to prove redundancy on company — Whether employee should be reinstated to previous position*

The applicant, Kaolin (M) Sdn Bhd (the defendant) made an application for certiorari to quash award No 307 of 1998 of the Industrial Court reinstating the respondent, Samba Sirvang a/l Thanimalai (the claimant) as assistant factory manager in the applicant's company in Tapah on the ground that the respondent had been unjustly dismissed. The respondent had been seconded to the position of personal assistant to the managing director in Kuala Lumpur from his former position. He was subsequently made redundant and he claimed that he should have been reverted to his former position, which had not been found to be redundant. The Industrial Court agreed with the company that the position of personal assistant to the managing director was redundant but also held, inter alia, that it was not shown that the position of assistant factory manager was so. The respondent was then reinstated. The company appealed.

Held, dismissing the application for certiorari:

(1) The burden is on the company to show redundancy (see p 125F); *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361 followed. The Industrial Court had clearly noted that the claimant had gone to that position on secondment and had rightly considered that such an arrangement was not a permanent arrangement and that his previous promotional position was that of an assistant factory manager. There was evidence that the duties and responsibilities of an assistant factory manager were being carried out by others at the factory in Tapah. In any event, the onus of proof was on the company to show that the position of an assistant factory manager was not available at the factory (see pp 125H–126A).

(2) The Industrial Court in looking at this issue acted within the jurisdiction of the reference made to it by the minister because the dismissal was not in regard to the claimant's position as personal assistant to the managing director but in regard to there being no other position at the factory for the claimant for the company to retain the claimant on a claim of termination of services as the basis of redundancy of position (see p 126B).

[Bahasa Malaysia summary

Pihak pemohon (defendan) telah membuat permohonan untuk certiorari untuk membatalkan award No 307 tahun 1998 oleh Mahkamah Perindustrian yang telah mengembalikan jawatan pihak responden (pihak menuntut) sebagai penolong pengurus kilang di kilang pemohon di Tapah, disebabkan kerana responden telah dipecat dengan tidak wajar. Responden telah dipinjamkan kepada jawatan penolong pengarah urusan di Kuala Lumpur daripada jawatan dahulunya. Tidak lama kemudian, responden telah dijadikan pekerja yang berlebihan (redundant). Mahkamah Perindustrian telah bersetuju dengan syarikat bahawa jawatan penolong pengarah urusan adalah berlebihan tetapi mahkamah juga telah memutuskan, inter alia, bahawa jawatan penolong pengurus kilang bukan berlebihan. Responden telah dikembalikan kepada jawatannya. Syarikat pemohon merayu.

Diputuskan, menolak permohonan untuk certiorari:

(1) Syarikat tersebut menanggung beban untuk membuktikan bahawa terdapat kerja yang berlebihan (lihat ms 125F); *Bayer M Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361 diikut. Mahkamah Perindustrian telah memerhatikan bahawa jawatan peminjaman tersebut telah disandang buat sementara sahaja dan jawatan sebenarnya selepas dinaikkan pangkat adalah sebagai penolong pengurus kilang. Terdapat bukti yang menunjukkan bahawa tugas-tugas dan tanggungjawab penolong pengurus kilang di kilang di Tapah pada masa tersebut sedang dilaksanakan oleh pekerja-pekerja lain. Beban untuk membuktikan bahawa pada masa tersebut tidak terdapat jawatan penolong pengurus kilang ditanggung oleh syarikat berkenaan (lihat ms 125H–126A).

(2) Dalam meneliti isu tersebut, Mahkamah Perindustrian telah bertindak mengikut bidang kuasa rujukan daripada menteri kerana perlucutan tersebut bukan berkenaan dengan jawatan pihak menuntut sebagai pembantu peribadi kepada pengarah urusan tetapi, adalah berkenaan dengan ketiadaan jawatan-jawatan yang lain di kilang pada masa itu yang membolehkan syarikat tersebut mengekalkan pihak menuntut di atas tuntutan penamatan perkhidmatan yang menjadi dasar kepada kewujudan jawatan yang berlebihan tersebut (lihat ms 126B).]

Notes

For a case on redundancy, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) para 823.

Cases referred to

Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361 (folld)

Williams Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (folld)

Legislation referred to

Industrial Relations Act 1967 s 20(4)

TM Varughese (*TM Varughese*) for the applicant.
S Muhendran (*Murugavell Arumugam & Co*) for the respondent.

KC Vohrah J. : This application is for a certiorari to quash Award No 307 of 1998 of the Industrial Court. The Industrial Court reinstated the respondent ('the claimant') as assistant factory manager in the applicant company ('the company') in Tapah on the ground that he had been unjustly dismissed.

The claimant had had his last position in the company as personal assistant to the managing director in Kuala Lumpur, a position to which he had been seconded from that of assistant factory manager in Tapah. He was retrenched on the ground that the job of personal assistant to the managing director and certain other jobs had been found to be redundant. The claimant's case was that he should have been reverted to his former position as assistant factory manager which had not been shown to be redundant. The Industrial Court agreed with the company that the position of personal assistant to managing director was redundant but went on to hold that it was not shown that the position of assistant factory manager was so and ordered the reinstatement of the claimant as assistant factory manager.

The company argued that the Industrial Court's award was based on conclusions which were inconsistent, contradictory and so unreasonable that the court committed errors of law in its award.

The company has a kaolin factory in Tapah. The claimant started work with the company as an unskilled worker at the factory in December 1969. He was steadily promoted to semi skilled worker, skilled worker, shift supervisor, chief supervisor and then after about 17 years in the factory he was made, in 1987, the assistant factory manager.

In 1994, in order to maintain industrial harmony in the factory where the claimant was a strict man the company agreed with the trade union of workers to move him from the position of assistant factory manager over some complaints from other workers, and the claimant did not object, to what was stated as 'secondment' from the factory to the Kuala Lumpur office. The claimant became the personal assistant to the managing director on the same salary as before but with an 'outstation' allowance.

On 28 December 1996, the claimant's services with the company were terminated through a letter of retrenchment sent to him. It was the company's stand that the claimant had been retrenched together with other employees as there was a redundancy position in the company because of a drop in business and expectation of loss in 1997.

It was the claimant's case before the Industrial Court that there was no evidence that the company was facing loss and therefore had to retrench, nor was there evidence that there was redundancy, as in fact work did exist in the company. The claimant's case was that he should have been transferred back to the factory.

A The Industrial Court found as a fact that the company's financial position was deteriorating in 1995 and 1996 and that it was reasonable on the part of the company to forecast a more adverse position in 1997.

The Industrial Court made a second finding of fact that there was a redundancy situation in the company and that the company had re-
B organized because of a reasonable expectation of a drop in the business and of reasonable expectation of loss in 1997. The Industrial Court was satisfied that though he was called personal assistant to the managing director he was in fact helping out in the administration and accounts department and the services of the claimant in helping out in the accounts and administration department were no longer required because of the
C reduced business and that the company did not take other staff to replace the claimant.

It will have to be borne in mind that the finding that the Industrial Court made was in respect of the redundancy of the claimant's job in Kuala Lumpur as personal assistant to the manager.

D The Industrial Court did not stop there. It went on to consider the issue raised by the claimant that if his services had been surplus in the Kuala Lumpur office he should have been returned to the factory in Tapah where he had been the assistant factory manager prior to his secondment to Kuala Lumpur.

E Following from that, the Industrial Court made a finding that the claimant was not properly retrenched as the company had considered the claimant's position as personal assistant to the managing director and not as assistant factory manager.

The Industrial Court's reasoning is set out below:

F > The company 'seconded' the claimant to the Kuala Lumpur office. It suggested that it was not a permanent arrangement. It must also be accepted that the company's action in 'seconding' him to Kuala Lumpur and calling him the personal assistant to the managing director, but in actual fact asking him to be no more than a clerical assistant was not right. It would have been a suitable ground for the claimant to have objected or even to consider he was constructively dismissed. It was not proven that the claimant had in fact been
G > guilty of the complaints raised by the workers at the factory. The action of the company was in the opinion of the court prejudicial to the interest of the claimant. By being seconded to the administration and accounts department, he became the most junior in terms of seniority and if the principle of 'last in first out' is applied the axe would fall on him. Had he remained at the factory at the time of the reorganization he would probably have been safe. It must
H > also be admitted that he has had a very good record in that from being an unskilled worker he climbed up to the post of assistant factory manager. In exh co 1, after the reorganization the factory manager's job had been abolished and presumably he was retrenched. The managing director who was located in Kuala Lumpur was made the head of the factory itself.

I The Industrial Court went on to hold that it was satisfied that the operation at the factory after the reorganization was looked after by the chief supervisor who was the claimant's subordinate when the claimant was at the factory as assistant factory manager. The court then considered whether the

claimant, if he were at the factory as the assistant factory manager prior to the decision to reorganize and reduce staff, would have been retrenched or would have escaped the axe.

The Industrial Court was of the opinion that the claimant ought to have been considered as the assistant factory manager rather than the non-performing personal assistant to the managing director when the company embarked on the reorganisation. The Industrial Court was of the view that the managing director, although located in Kuala Lumpur, did not actually run the factory, as was done by the claimant when he was the assistant factory manager.

The Industrial Court also stated that the onus was on the company to prove that the service of the claimant as assistant manager were surplus to the needs of the company and that was not done. The court stated:

> The court would be with the company if the claimant was a genuine personal assistant performing clerical and accounts work whose service would be surplus after the reorganization. But the claimant, by hard work, had become the assistant factory manager. It was not his fault he was seconded to the Kuala Lumpur office. He had reasonable expectation to be returned to his substantive job and to the security of tenure in that job.

The Industrial Court concluded that the company had failed to prove that the claimant was properly retrenched on the ground of redundancy because it had considered the position of personal assistant to the managing director instead of assistant factory manager and the claimant was in the circumstances, dismissed without just cause.

The company said that the conclusions arrived at by the Industrial Court are inconsistent, contradictory and so unreasonable that errors of law were committed by that court.

The points made by the company are:

(1) The pleadings of the claimant show that the claimant sought reinstatement to his former position specifically as personal assistant and he never made any mention of the position of assistant factory manager.

(2) The Industrial Court being a creature of statute, its jurisdiction to hear a dispute is limited to the issues referred by the minister under s 20(4) of the Industrial Relations Act 1967 and the reference being for the Industrial Court to adjudicate the issue of dismissal of the claimant on 28 December 1994, even if the secondment was wrong (in law), the Industrial Court had no jurisdiction to provide the claimant with a remedy relating to that.

(3) The Industrial Court had erred when it considered the retrenchment was bad in respect of the position of assistant factory manager and not the position of personal assistant to the managing director when the position of assistant manager had ceased to exist two years previously in December 1994 and the court was speculating without legal basis when it stated that had the claimant remained at the factory he probably would have been safe and that since the position of personal

assistant was the only suitable position in the organization, the court was wrong in applying the 'last in, first out' principle.

It will be noted that all the grounds are overlapping and they touch on the fact that the Industrial Court reverted the claimant to the position of assistant factory manager in Tapah.

My view is that all the grounds have, with respect, no merit. As regards the pleadings issue, it will be seen that the Industrial Court scrutinized the issues in the pleadings and the excuses for the dismissal.

To the pleadings that his dismissal was without any just cause or excuse, the company in para 5 of its statement of reply pleaded redundancy and in para 6 stated:

> The company will adduce evidence at the hearing to show that the company no longer has a position which could justify the relation of the claimant in the company.

The duty of the Industrial Court in dealing with retrenchment cases is spelt out in *Williams Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585 at p 2590:

> Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organize his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide.

The burden is on the company to show redundancy. In *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361, the Court of Appeal opined at p 364:

> On redundancy, it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see *Chapman & Ors v Goonvean & Rostowrack China Clay Ltd* [1973] 2 All ER 1063).

Here I would like to note that it would be wrong to take bits and pieces of the award and criticise them out of context. I have set out earlier what the Industrial Court gave as reasons for holding that the claimant had been unjustly dismissed.

From what I had set out earlier, as regards what the Industrial Court had considered, it is quite clear the court had considered not so much whether the position of personal assistant to the managing director had ceased to exist but whether his duties as a workman had ceased. The court had clearly noted that the claimant had gone to that position on secondment and had rightly considered that such an arrangement was not a permanent arrangement and that his previous promotional position was that of an assistant factory manager. There was evidence that the duties and responsibilities of an assistant factory manager were being carried out by

others at the factory in Tapah. In any event, the onus of proof was on the company to show that the position of an assistant factory manager was not available at the factory and it will be remembered that the company pleaded in its statement of reply at para 6 that 'there is no other position at the factory for the applicant to retain the respondent .'

The Industrial Court in looking at this issue acted within the jurisdiction of the reference made to it by the minister because the dismissal was not in regard to the claimant's position as personal assistant to the managing director but in regard to there being no other position at the factory for the claimant for the company to retain the claimant on a claim of termination of services as the basis of redundancy of position.

I have not been able to see any error of law committed by the Industrial Court.

In the premises, the application for certiorari is dismissed with costs.

Application for certiorari dismissed.

Reported by Chew Phye Ken